Supreme Court, U.S.
FILED
MAY 5 1998
CLERK

Nº. 97-1568

In The
Supreme Court of The United States
October Term 1997

ROBERT and ANN CLYNES, as Parents and Next Friends of Nicholas Clynes,
Petitioners,

v.

FT. ZUMWALT SCHOOL DISTRICT, et al.,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

REPLY TO BRIEF IN OPPOSITION

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REASONS FOR GRANTING THE WRIT

JURISDICTION

The Clynes are represented at no cost to them by Missouri Protection and Advocacy Services. This agency is a public law center which receives its funds from the federal government. This non-profit agency has a scarcity of funds with which to conduct its services on behalf of people with disabilities.

In this case, the undersigned sought to minimize the costs associated with filing a Petition for Writ of Certiorari. In that effort, he sought to produce an appropriate document on his computer and then have it printed and bound at Kinkos. Unfortunately, that effort was not a successful one. However, the initial Petition was filed in this Court in good faith. Primarily because the Petition printed and bound by Kinkos did not have 3/4 inch margins, as the undersigned thought he had produced on his computer, this Court returned it to him pursuant to Rule 14.5.

Upon the return of the Petition, the undersigned secured the necessary funds to send the Petition to an experienced printer of Petitions for Writs of Certiorari to be filed in this Court. In his work with that printer, the undersigned was told that the Petition, properly formatted and spaced, was nine (9) pages too long. For that reason, and no other, the undersigned sought to reduce the size of the initial Petition by nine (9) pages, without changing its substance.

The undersigned was able to do that by deleting one argument, which related to damages and their availability under the IDEA. The undersigned further deleted some argument in the remaining questions presented, but did not change the substance.

Contrary to the assertion of Ft. Zumwalt, the undersigned did not utilize the additional sixty days to "rewrite and revise" the

Petition. (FTZ Resp. at 16). Rather, the only changes made were deletions accompanied with appropriate passages of short duration which allowed for a coherent and logical flow of the document.

Ft. Zumwalt has chosen to lodge in this Court the initial Petition. Certainly, the Clynes are delighted with this opportunity to point the Court to that lodged document. Indeed, if it is the position of Ft. Zumwalt that the original document ought to be the one reviewed by this Court, the Clynes are wholeheartedly in favor of that position.

The undersigned reiterates that he engaged in a good faith effort to file an appropriate brief in this Court in timely fashion. That he failed to do so is embarrassing, but has nothing to do with an attempt to gain an advantage, and Ft. Zumwalt has not claimed that it has been prejudiced in any way.

NO STANDARD TO APPLY

The different positions taken by the parties in this matter may be ascertained by reviewing how they phrase their "questions presented." The Clynes assert that any standard created by this Court in ***Rowley*** is indefinite and does not give sufficient guidance to judges. Ft. Zumwalt states the question is whether the Eighth Circuit has properly articulated the legal standard. The foundation of this Petition and Reply rests upon the thesis that there is no legal standard to apply properly. The issue is not whether the Eighth Circuit articulated and applied the appropriate standard, but whether there is a standard that exists. We posit that there is none and this Court ought to take this case so as to create one.

The Clynes believe that they have established in their Petition, and the cites to cases therein, that this Court has not set forth a standard which when applied by the various courts results in predictable and equitable results. This position cannot be made clearer than in this case. Ft. Zumwalt, in its response to the

Petition for Writ of Certiorari, states : "The Eighth Circuit's opinion cites directly and repeatedly to ***Rowley*** in stating the appropriate standard for determining FAPE. There is no evidence that in the present case, the Eighth Circuit applied any standard different from that set forth by this Court." (FTZ Resp. at 20). The standard referred to by Ft. Zumwalt, that a school district only has to provide a program "reasonably calculated to enable the child to receive educational benefits," has been cited by each judge who reviewed this as support for his or her position. However, the Due Process panel split two-to-one in favor of Ft. Zumwalt. The State Level Review Officer found in favor of the Clynes. The District Court found in favor of the Clynes. The Eighth Circuit split two-to-one in favor of Ft. Zumwalt. One might conclude from reading the response of Ft. Zumwalt that only the Eighth Circuit majority cited ***Rowley*** for its position, since the standard is clear. The problem is, "some educational benefit" means something different to everyone who has reviewed this case, which is why it has resulted in a vote of four-to-four of the eight people who have been charged with making a decision in regard to it.

In his conclusions of law, the District Court thought it understood what the proper standard was when reviewing this case, that found in ***Rowley***. This is what it had to say:

> "122. Whether a free public education is 'appropriate' depends upon whether the education is 'sufficient to confer some educational benefit upon the handicapped child." *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176, 200, 102 S.Ct. 3034, 3048, 73 L.Ed.2d 690 (1982). The child's grades, tests scores, and advancements from one grade level to the next are important evidence for the Court to consider in assessing whether the child has benefited from her education. *Id.*

* * *

"130. Nicholas did advance from one grade to the next after the 1988-89 school year and passed many of his classes. *See supra* pp 2, 15, 21, 25. However, Nicholas repeated first grade and tests scores showed that his reading skills remained the below grade level at the end of his third grade year. *See supra* pp 11, 32-33, 39. Also, he could not write a complete sentence when he entered the Churchill school. *See supra* pp 27. Perhaps more disturbing, Nicholas's word attack skills never advanced past a first grade level while he attended Hawthorn. *See supra* ¶ 33.

"131. The District did not change its methods for teaching Nicholas and did not consider changing his placement even after those methods proved unsuccessful. *See supra* pp 18-21, 27-39. The third grade IEP did not even set goals for word attack skills. *See supra* pp 22-23. Faced with poor test scores in May of 1991, and declining grades, the District merely increased Nicholas's time in the LD Resource Room after decreasing it each year. *See supra* pp 10, 14, 17, 22, 40.

"132. While the IEP for the 1991-92 school year did set goals in word attack skills, Nicholas's teacher stated that she would have continued to focus on Nicholas's vocabulary of 'sighted words.' *See supra* at ¶ 41. By failing to address Nicholas's serious decoding problems, the District failed to address adequately Nicholas's learning disability. *See supra* pp 23, 28-38, 41.

"133. The District also did not deal with Nicholas's problems with frustration and low self-esteem. District staff blamed Nicholas for their own failures. *See*

supra pp 26-27, 42-43. They accused Nicholas of giving up on himself when they had given up on Nicholas. *Id.* (Pet App. at 29-33).

Judge Gibson, who dissented from the majority of the Eighth Circuit, also understood what the appropriate standard was, relying on ***Rowley***. Judge Gibson spent an entire paragraph discussing the standard for FAPE set forth in ***Rowley***. (Pet App. at 68). Judge Gibson stated in salient part:

> "An IEP satisfies IDEA's requirement of a free and appropriate public education so long as it 'consists of educational instruction specifically designed to meet the unique needs of the [disabled] child, supported by such services as are necessary to permit the child to 'benefit' from the instruction." [***Rowley*** 458 U.S. at 188-189.]

[Pet App. at 68]. Judge Gibson then reviewed the facts and measured them according to this Court's pronouncements in ***Rowley***:

> "In light of the detailed factual findings made by the district court, and giving 'due weight' to the SLRO's determination that the IEP for the 1991-1992 school year was inappropriate, I am unable to conclude that Fort Zumwalt provided Nicholas a free appropriate public education for that period. The district court found that from September of 1989 to May of 1991 Nicholas's word attack skills had not risen above a first grade level, see Fort Zumwalt Sch. Dist. v. Missouri State Bd. Of Educ., 923 F.Supp. 1216, 1222 (E.D.Mo. 1996), and a standardized test administered in September of 1991 revealed that his reading proficiency ranked in the second to ninth percentile, see id. at 1224. At the close of his fifth year in the Fort Zumwalt School District, Nicholas Clynes,

at the age of ten, still did not know the alphabet, could not recite the days of the week, and could not identify the months of the year. See id. at 1222. It is true, as the majority points out, that Fort Zumwalt promoted Nicholas to the fourth grade, but it is notable that in third grade Nicholas did not receive a mark above a 'C.' See id. at 1221. By the end of the year, Nicholas had failed Spelling and had managed to raise a failing grade in Reading for the third quarter to a 'D' for the final quarter. See id.

In the face of these disturbing trends, Fort Zumwalt prepared an IEP for 1991-1992 that did not propose any significant changes in Nicholas's educational placement. See id. at 1222. The IEP did set goals in word attack skills, but Nicholas's resource room instructor, Miss Ruhr, testified that she would continue to emphasize the child's ability to recognize the meaning of sighted words, a method that had failed miserably in the past to enhance Nicholas's reading aptitude. See id. At the meeting to discuss the IEP, the Clyneses expressed concern with Nicholas's inability to read and asked what alternatives were available to their son. See id.; App. at 459-60. The district reacted by attributing Nicholas's academic shortcomings to his own poor attitude and refusal to put forth the requisite effort. See Fort Zumwalt, 923 F.Supp. at 1222. Miss Ruhr stated that she had 'tried everything' and did not 'know what else to do"; in her opinion, Nicholas had 'chosen not to learn.' See id.; App. at 26. Alarmed by this response, Mrs. Clynes later telephoned Pat Moore, Fort Zumwalt's director of special education, to discuss Nicholas's meager progress. See Fort Zumwalt, 923 F.Supp. at 1222. Mrs. Moore informed the worried

mother that some children are simply 'non-readers' despite the district's best efforts. See id. After deciding that the district had given up on Nicholas, the Clyneses enrolled the child in the Churchill School.

I agree with the SLRO and the district court that the IEP for 1991-1992 was not designed to provide 'personalized instruction with sufficient support services to permit [Nicholas] to benefit educationally from that instruction.' Rowley, 458 U.S. at 203. To be sure, Nicholas was steadily advancing from grade to grade in the Fort Zumwalt schools, and the Supreme Court has stressed the "[t]he grading and advancement system . . . constitutes an important factor in determining educational benefit," Rowley, 458 U.S. at 203, but Nicholas's achievements, particularly in the area of reading skills, can at best be described as trivial. This cannot be the sort of education Congress had in mind when it enacted IDEA."

(Pet App. at 70-73).

Of course, the SLRO understood what the standard was, that announced by this Court in ***Rowley***. The SLRO spent over a page discussing the standard he found in ***Rowley***. (Pet App. at 46-47). After reviewing the facts the SLRO officer measured them by the standard announced by this Court in ***Rowley***. The SLRO found that the evidence did not support the panel majority's decision that Nicholas was offered FAPE for the 1991-92 school year and that his parents' placement of him at Churchill for that year was proper and reimbursable. (Pet App. at 51).

Each of these three judges thought they understood what this Court meant when it enunciated its so-called standard in ***Rowley***. The majority of the Eighth Circuit thought they understood the standard announced by this Court in ***Rowley***. Because the standard

is amorphous, without any discernable limits, each judge was allowed to read the facts as he or she felt appropriate in light of their own unique and individualized experiences in life. That is no standard. That is no process. That is a sure recipe for a denial of equal protection.

DEFERENCE

Ft. Zumwalt states the majority of the Eighth Circuit panel afforded the appropriate level of deference to the district court below. (FTZ Resp. 23-24). If the majority of the Eighth Circuit panel had deferred to the factual findings of the district court it would have concluded that Nicholas could not write a complete sentence when he entered the Churchill School; that his word attack skills never advanced past a first grade level while he attended Hawthorn; that faced with poor test scores in May of 1991 and declining grades, the district adamantly refused to change its educational program for Nicholas, and blamed him for his learning disability; that the district staff blamed Nicholas for their own failures; that the district staff accused Nicholas of having given up on himself when they had given up on him; that district officials ignored the advice of Mr. Arnett, Nicholas's first grade teacher during the 1988-89 school year. (Pet App. at 32-33). Judge Gibson, who dissented on the Eighth Circuit, thought it appropriate to defer to these findings of fact of the district court. (Pet App. at 70).

Instead of deferring to the findings of fact of the District Court, unless clearly erroneous, the panel majority sat as a super fact finder and made its own findings of fact, findings that no one had ever made in this case. It made critical findings of fact which were completely contrary to those made by the SLRO and by the district court. For instance, both the district court and the SLRO found that the District had given up on Nicholas. The panel

majority stated: "The comments made by educators that were critical of Nicholas's attitude should not have been interpreted to mean that they had given up on addressing his problems, but rather simply reflecting his behavior." (Pet App. at 61). As noted by the Clynes in their Petition, other circuits, like the Fifth in ***Cypress-Fairbanks v. Michael***, 118 F.3d 245 (5th Cir. 1997, *cert. denied*, 118 S.Ct. 690 (1998)), and the Ninth Circuit in ***County of San Diego v. California Special Education Hearing Office***, 93 F.3d 1458 (9th Cir. 1996), defer to the district court's factual determinations unless clearly erroneous. The determination of how much deference is to be accorded to the fact findings of the district court is the subject of a split in the circuits.

DEFERENCE TO THE SLRO

There is a clear split in the circuits on this point as well. In his dissent, Judge Gibson notes that in states which employ a two-tiered administrative system, such as Missouri, deference is to be given to the person empowered to issue a final decision for the state. Citing, ***Thomas v. Cincinnati Board of Education***, 918 F.2d 618, 624 (6th Cir. 1990) (the only logical position, under ***Rowley*** and general principles of administrative law, is that federal courts are required to defer to the final decision of the state authorities, in this case that of the SLRO.) [Pet App. at 69].

Not only did the majority of the Eighth Circuit ignore the findings and conclusions of the SLRO, they did so while creating a standard never enunciated before or since: "The [district] court's criticism of the educational methods used by the district was not based on findings of the state educators who reviewed the matter." (Pet App. at 63). In fact, there are no state educational experts who reviewed any portion of this case. In Missouri, three panel members sit on the Due Process Hearing. The parents pick a panel member from an approved list, and the school district picks a panel

member from an approved list. Then the parties agree on the Chairperson to be picked from an approved list. In this case, the school district selected as its panelist a special education director, like a defendant in this case, Pat Moore. It was a situation of colleague reviewing a colleague. Hardly could the panelist selected by Ft. Zumwalt be called a state educational expert. He was not employed by the state and he was not an expert. He was just a special education director of a public school district. The chairperson was also a special education director of a public school district.

To whom deference is due is dispositive. There is a split in the circuits on this issue. Interestingly, Ft. Zumwalt does not even discuss ***Thomas v. Cincinnati Board of Education***, 918 F.2d 618 (6th Cir. 1990).

CONCLUSION

The Clynes respectfully request that this Court issue its Writ to the Eighth Circuit so that it may clarify its standard of 'some educational benefit' anent FAPE; and, announce a rule of process whereby it is definite to whom deference is due in regard to the findings of facts in IDEA cases. Without a solid framework within which to analyze facts, we are left with the present situation which amounts to each judge ruling based upon his own life experiences.

Respectfully submitted,

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